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CV-03-450 PM 3:23
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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF IDAHO

★ ★ ★ ★ ★

POCATELLO DENTAL GROUP, P.C., an)
Idaho professional corporation,)

Plaintiff,)

vs.)

INTERDENT SERVICE CORPORATION,)
a Washington corporation,)

Defendant.)

INTERDENT SERVICE CORPORATION,)
a Washington corporation,)

Counterclaimant,)

vs.)

POCATELLO DENTAL Group, P.C., an)
Idaho professional corporation; DWIGHT)
G. ROMRIELL, individually; LARRY R.)
MISNER, JR., individually; PORTER)

Case No.: CV-03-450-E-LMB

**ORTHODONTIC CENTERS OF
IDAHO, INC.'S REPLY TO
INTERDENT SERVICE
CORPORATION'S OPPOSITION TO
MOTION TO QUASH SUBPOENA**

1165

SUTTON, individually; ERNEST)
SUTTON, individually; GREGORY)
ROMRIELL, individually; ERROL)
ORMOND, individually; and ARNOLD)
GOODLIFFE, individually,)

Counterdefendants.)

LARRY R. MISNER, JR, individually,)

Counterclaimant,)

vs.)

INTERDENT SERVICE CORPORATION,)
a Washington corporation,)

Counterdefendant.)

LARRY R. MISNER, JR., individually,)

Crossclaimant,)

vs.)

POCATELLO DENTAL GROUP, P.C., an)
Idaho professional corporation,)

Crossdefendant.)

COMES NOW, Orthodontic Centers of Idaho, Inc. ("OCI"), a wholly owned subsidiary of Orthodontic Centers of America, Inc. ("OCA") and a non-party to this litigation, by and through counsel and offers its reply to Interdent Service Corporation's ("ISC") opposition to its motion to quash the subpoenas served upon them by ISC.

I. INTRODUCTION

As evidenced in OCI's motion to quash with its accompanying affidavit, OCI is a non-party in the underlying litigation and has no employees whatsoever in the state of Idaho and merely retains an agent for service of process in Idaho. OCI's registered agent in Idaho is neither a general agent nor a corporate officer nor does it control any of the documents referred to or requested by ISC. OCI concedes this Court has personal jurisdiction over it for the purposes of being sued in the District of Idaho. In spite of this fact, geographic limitations imposed by Rule 45 prevent this Court from having authority to enforce a subpoena served upon OCI as OCI is a non-party and any subpoenaed deponent or any subpoenaed documents are in a foreign district, more than 100 miles from Boise, Idaho. Further, an attempt to enforce a subpoena that violates the mandatory provisions of Rule 45(c)(3) would be a *per se* violation of the Rule 45(c)(1) duty, requiring this Court to impose sanctions upon the party seeking to enforce such a subpoena.

OCI's contractual relationships with Valley Dental and Dr. Bybee are wholly irrelevant to this suit as their existence has no bearing on the parties in the underlying litigation. Because Misner works for a dental office in the Pocatello area and is involved in litigation with ISC, that fact does not make the contractual relationship between the dental office that hired Misner and its management company relevant. Valley Dental is not Misner's "competing dental office" as alleged by ISC. OCI's only relationship with Misner stems from the fact that Misner works for a dental office owned by Bybee who has contracted with OCI for management services. Further, Misner is free to enter into any type of agreement and with whomever he so chooses. ISC's non-compete agreement only pertains to *where* he may or may not practice, not with or for whom.

For these reasons, as further addressed below, the subpoena issued by ISC to OCI should be quashed and appropriate sanctions should be enforced upon ISC for attempting to enforce a subpoena that violates the mandatory provisions of Rule 45(c)(1) and (3).

II. ARGUMENT

A. ISC SOUGHT TO ENFORCE ITS SUBPOENA AGAINST OCI REGARDLESS OF THE MANDATORY PROVISIONS OF RULE 45(c)(1).

ISC, in *issuing* its Notice of 30(b)(6) deposition and the subpoena duces tecum upon OCI has failed to comply with the mandates as provided in Rule 45(c)(1).

A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

FED. R. CIV. P. 45(c)(1).

In *Matthias Jans & Associates, Ltd. v. Dropic*, 2001 U.S. Dist. LEXIS 4841 (W.D. Mich. Apr. 9, 2001), the plaintiff, who was involved in litigation in the United States District Court for the Northern District of Ohio, served the defendant's daughter, who resided in the United States District Court for the Western District of Michigan, Southern Division, with a subpoena duces tecum, purporting to require her appearance at a deposition in Cleveland, Ohio. The defendant's daughter then filed a motion to quash her subpoena, contending that the subpoena was in violation of Rule 45(c)(3) because it required her to travel more than 100 miles from the place where she resides or works. *Id.*

In quashing the subpoena, the court pointed out that Rule 45(c)(3)(A) mandates a subpoena be quashed if it "requires a person who is not a party or an officer of a party to travel to a place more

than 100 miles from the place where that person resides, is employed, or regularly transacts business in person.” *Id.* The court then adds that the mandates of Rule 45 are mandatory safeguards and a subpoena *must* be quashed “if it purports to require a nonparty to travel to a place more than 100 miles from his or her residence or employment.” *Id.* citing *Comm-Tract Corp. v. Northern Telecom, Inc.*, 168 F.R.D. 4, 7 (D. Mass. 1996); 9 A C HARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2463, at 70 (2d ed. 1995). “An attempt to enforce a subpoena that violates the mandatory provisions of Rule 45(c)(3) is a *per se* violation of the Rule 45(c)(1) duty.” *Id.* “The rule also requires the Court to enforce this duty and to impose sanctions when an attorney or party breaches this duty.” *Anderson v. Gov’t of the Virgin Islands* , 180 F.R.D.284, 291 (D. VI 1998).

ISC served OCI with its Notice of Rule 30(b)(6) Deposition and the accompanying subpoena upon OCI’s registered agent in Boise, Idaho. As demonstrated by Exhibit 4 of the Affidavit of Scott J. Kaplan in Opposition to OCI’s Motion to Quash, ISC knew OCI was located in Metairie, Louisiana, but sought to subpoena OCI to Boise, Idaho, regardless of Rule 45 and OCI’s non-party status. Rule 45(c)(1) expressly provides an affirmative duty upon a party responsible for the issuance of a subpoena to take reasonable steps to avoid imposing an undue burden or expense on a person subject to the subpoena.

ISC, by issuing the subpoena upon OCI has ignored the mandatory safeguards of Rule 45 which are in place for the protection of persons subject to subpoena. The mere act of ISC issuing the subpoena upon OCI, who is a non-party, and commanding OCI’s designated deponent to appear in Boise, Idaho is in and of itself a *per se* violation of Rule 45(c)(1), subjecting ISC to an appropriate sanction from this Court.

B. THIS COURT IS WITHOUT AUTHORITY TO ISSUE A SUBPOENA DUCES TECUM TO A NON-PARTY LOCATED IN ANOTHER DISTRICT.

The subpoena issued upon the non-party OCI is unenforceable by this Court and should be quashed due to this Court's lack of authority to even enforce it. "[U]nder traditional notions of power and jurisdiction, a court cannot order production of records in the custody and control of a non-party located in a foreign judicial district." *Cates v. LTV Aerospace Corp.*, 480 F.2d 620, 624 (5th Cir. 1973) citing *Chessman v. Teets*, 239 F.2d 205, 213 (9th Cir. 1956); *Elder-Beerman Stores Corp. V. Federated Dept. Stores, Inc.*, 45 F.R.D. 515, 518 (S.D.N.Y. 1968). See also *Anderson v. Gov't of the Virgin Islands*, 180 F.R.D.284, 289 (D. VI 1998)("A district court cannot issue a subpoena duces tecum to a non-party for the production of documents located in another district.") citing *Natural Gas Pipeline Co. Of Am. V. Energy Gathering, Inc.*, 2 F.3d 1397, 1406 (5th Cir. 1993), *cert. denied*, 510 U.S. 1073, 127 L.Ed. 2d 77, 114 S. Ct. 882 (1994); *Kupritz v. Savannah College of Art & Design*, 155 F.R.D. 84, 87 (E.D. Pa. 1994).

OCI is a non-party to the underlying litigation in this matter and pursuant to the affidavit attached as Exhibit C to OCI's motion to quash, there are no witnesses from OCI capable of testifying pursuant to the subpoena that meet the territorial requirements of Rule 45(c). The subpoena must be quashed.

1. The presence of a registered agent in Idaho and OCI's conducting of business in Idaho does not provide this Court with authority to enforce ISC's subpoena.

Even though ISC has a registered agent in Idaho and does regularly conduct business in Idaho, ISC's subpoena upon them as a non-party, is not subject to enforcement by this Court. In *Crafton v. U.S. Specialty Ins. Co.*, 218 F.R.D. 175 (E.D. Ark. 2003), the Plaintiff issued a subpoena upon the registered agent of a non-party corporation located within the district boundaries of the

underlying litigation. The corporation, however, was located in another judicial district outside the 100 mile requirement of Rule 45(c)(3). The Plaintiff, in resisting a motion to quash the subpoena, argued, as does ISC, that since the corporation had sufficient minimum contacts with the forum, a subpoena may be served on the agent for the corporation even if the records are located in another jurisdiction. *Id.* at 176.

The subpoenaed party argued that it maintained its records in a foreign jurisdiction and the presence of the registered agent in the forum was for service of process. The registered agent was neither a general agent nor a corporate officer nor did he control any of the documents referred to or requested by plaintiff. *Id.*

The court, in quashing plaintiff's subpoena, relied upon *Echostar Communs. Corp. v. News Corp. Ltd.*, 180 F.R.D. 391, 396-97 (D. Colo. 1998).

Echostar states that it has served its subpoenas upon registered agents for Cox and GE Americom here in Colorado. Echostar argues that because the Court has jurisdiction over these non-parties, the Court possesses the power to enforce the subpoenas, and order the parties to comply with them. However, simply because this Court has jurisdiction over the non-parties does not make this Court the most appropriate forum for either issuance or enforcement of subpoenas. *Ariel v. Jones*, 693 F.2d 1058, 1060 (11th Cir. 1982).

The appropriate question to ask is the question posed by the Eleventh Circuit in *Ariel v. Jones*: whether the agent for service of process possesses "the degree of control" over the documents which would make it appropriate to enforce a subpoena over a corporation from a court in one state, when the corporation's documents are located in another state. *Id.* at 1060.

Even positing that this court has personal jurisdiction . . . , it is unreasonable to assume that these appellants' local offices "control" all documents kept at their respective corporate headquarters. . . . In the absence of such control, therefore, even the existence of personal jurisdiction in this court is insufficient to create jurisdiction over the documents which are outside of the district. *Id.* at 1061.

Id. at 177.

Finally, the court relied upon the language of Rule 45(a)(2) which requires the subpoenas to be issued from the court for the district in which the production or inspection is to be made. "Echostar did not comply with the mandates of this rule, and failed to obtain the issuance of subpocnas from the states where production of materials were to be obtained from Cox and GE Americom. I find that the subpocnas which were issued upon Cox and GE Americom are invalid." *Id.*

Similarly, in *In re Price Waterhouse LLP*, 182 F.R.D. 56 (S.D.N.Y. 1998) the court quashed a subpoena that was issued in violation of Rule 45. "The Rule establishes a simple mechanism for protecting nonparties from burdensome discovery in an action in which they have little interest: the subpoena *must issue from*, and the deposition must take place in, *the district where the witness is.*" *Id.* at 63.

OCI is a non-party to the underlying litigation. OCI does not have any employees in Idaho and is a wholly owned subsidiary of OCA, located in Metairie, Louisiana. The registered agent of OCI located in Boise, Idaho is not a general agent nor a corporate officer nor does he control any of the documents referred to or requested by ISC. See **Exhibit "A"** attached hereto and incorporated as if set forth in full. The subpoena served upon OCI should have been issued by the U.S. District Court in which OCI resides. In all reality, OCI could actually *ignore* the subpoena issued by ISC since any order compelling enforcement of the subpoena would have to be issued by the district court wherein OCI resides. Further, even though OCI conducts business in Idaho, these minimum contacts only subject it to *suit* in this District. This Court, sitting in Idaho, cannot issue a subpoena duces tecum to OCI, absent a suit naming OCI as a party, which mandates OCI's appearance in Boise, Idaho for a deposition, nor for the production of documents located in Louisiana.

C. THE INFORMATION REQUESTED FROM OCI BY ISC IS SIMPLY NOT RELEVANT.

Many of the same arguments addressed in Bybee's reply memorandum in support of his motion to quash, too, are pertinent as applied to OCI. ISC is seeking (1) all contracts and agreements between OCI, Valley Dental, P.A., Dr. Larry Bybee and/or Dr. Larry Misner. (2) All employment and non-compete contracts entered into by Valley Dental, P.A. or any of its dentists. (3) All business plans, projections or other documents submitted to OCI by Valley Dental, P.A., Dr. Larry Bybee and/or Dr. Larry Misner for the purpose of entering into a business relationship with you. (4) All communications between OCI and Valley Dental, P.A., Dr. Larry Bybee and/or Dr. Larry Misner before March 15, 2004. *See OCI's Motion to Quash, Exhibit A.* This requested information is simply not relevant.

OCI is the management company for Valley Dental. ISC alleges that simply because Misner works for a dental practice that is managed by OCI, that all of a sudden the relationship that OCI has with the dental practice is relevant to Misner and his former relationship with ISC. The tie between OCI and Valley Dental and Dr. Larry Bybee, who are all non-parties in the underlying litigation and whom all are free to be involved in the practice of dentistry, however and wherever as may lawfully be allowed, has absolutely no bearing on Misner and his previous professional relationships.

ISC asserts as the main justification in obtaining the above requested documents from OCI that the documents will evidence Misner's arguments pertaining to illegality of the management and non-compete agreements with ISC as being "pretextual".¹ ISC also believes the records of OCI

¹Misner's subjective motives for asserting that the management contract between PDG and ISC is illegal and thereby unenforceable is of no relevance to the legality of the management agreement or any other issue in this case.

would establish the standard by which its own conduct should be judged. Hence proving the ISC management agreement and the non-compete agreements to be standard in the industry.

As previously stated, assuming the requested documents were identical to the ISC agreements at issue here, that fact would have absolutely no relevance to the legality of the ISC agreements in the underlying litigation. An illegal contract is unenforceable in Idaho without regard to whether other similar contracts not before the court do or do not exist.

Finally, ISC refers to Valley Dental as "Misner's competing dental office." Misner is an *employee* of Valley Dental. The interactions between Misner and his employer and the employers management company are irrelevant to the underlying action. Further, and perhaps of most importance, Misner himself, had he chosen to stay in Burley, Idaho and practice full time, was, and still is free to communicate with and enter into a management agreement with OCI under whatever terms the parties so choose. That agreement, should it exist, has no relevance in determining the legality of the management and non-compete agreements in issue with ISC. ISC's non-compete agreement pertains to *where* Misner may practice. Nothing in the agreement limits whom Misner may work for or under what terms.

III. CONCLUSION

For the foregoing reasons, OCI respectfully requests this Court to quash the subpoenas issued by ISC.

DATED this 6 day of August, 2004.

RACINE, OLSON, NYE, BUDGE &
BAILEY, CHARTERED

By: _____


STEPHEN J. MUHONEN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6 day of August, 2004, I served a true and correct copy of the above and foregoing document to the following person(s) as follows:

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STEPHEN J. MUHONEN

EXHIBIT A

Parish of Jefferson

State of Louisiana

AFFIDAVIT

Before me, Notary Public, personally came and appeared:

Bartholomew F. Palmisano, Sr.

Who upon being placed under oath did depose and state:

That he is a person of full age and majority and capable of giving this affidavit

That he is President and Chief Executive Officer of OCA

That OCI's Idaho's registered agent, National Registered Agents, Inc. is not
OCA or OCI's general agent

That National Registered Agents, Inc. is not a corporate officer of OCA or OCI

That National Registered Agents, Inc. is not the depository nor has any control
over any of the documents requested by ISC in its subpoena


Bartholomew F. Palmisano, Sr.

SWORN TO AND SUBSCRIBED TO,
Before me, Notary Public, this 5th day
Of August 5, 2004


Notary Public